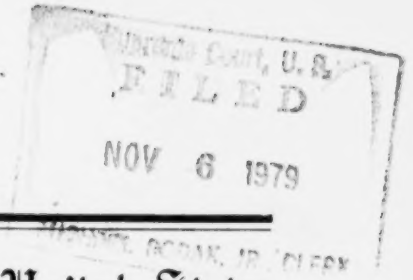


No. 79-315



In the Supreme Court of the United States

OCTOBER TERM, 1979

WHITE MOUNTAIN BROADCASTING CO.,
INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-19a) is reported at 598 F.2d 274. The decisions of the Federal Communications Commission (Pet. App. 27a-55a, 20a-26a) are reported at 60 F.C.C.2d 342 and 61 F.C.C.2d 472. The decision of the Administrative Law Judge (Pet. App. 56a-118a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission acted arbitrarily in denying license renewal to a broadcast licensee whose president and sole stockholder knowingly permitted his station repeatedly to violate the Commission's fraudulent billing rule over a five-year period.

STATEMENT

The Federal Communications Commission, after a full evidentiary hearing, denied petitioner White Mountain Broadcasting Co., Inc.'s application for renewal of licenses for a standard radio station, WMOU, and an FM Station, WXLQ, both in Berlin, New Hampshire. The Commission took this action based on undisputed evidence that petitioner had engaged in flagrant and protracted fraudulent billing activities in violation of the Commission's rules.

The evidence adduced in the administrative hearing established that from February 1969 to August 1974 petitioner had regularly engaged in the practice of sending two bills to local advertisers for commercials broadcast on petitioner's station. One bill reflected the actual cost and quantity of advertising broadcast, which the local advertiser would pay to petitioner; the other bill stated inflated amounts which the local advertiser would send to the national advertiser to induce the national advertiser to pay the local advertiser more than its proper share of advertising costs under usual cooperative advertising agreements (Pet. App. 10a). This practice was in violation of the Commission's rules, which prohibit licensees from issuing any bill "which contains false information concerning the amount actually charged by the licensee for the broadcast advertising * * * or which misrepresents the quantity of advertising actually broadcast * * *." 47 C.F.R. 73.1205.

The record also showed that shortly after acquiring the stations in 1969, petitioner's president and sole stockholder, Robert Powell, had been expressly informed by his general manager that his stations were engaged in fraudulent billing. At the hearing, Powell conceded that he knew that fraudulent billing violated Commission rules and that fraudulent billing might result in the loss of his stations' licenses. Nevertheless, he took no affirmative steps to stop the practice, and it continued at least until the Commission began an investigation in August 1974 (Pet. App. 33a-38a). To the contrary, Powell participated in such practices by executing numerous affidavits containing false information concerning the cost and quantity of the advertising broadcast (Pet. App. 35a).

Emphasizing its repeated past public notices and rulemakings warning licensees of the seriousness of fraudulent billing, the Commission concluded that the appropriate sanction in this case was to deny renewal of petitioner's licenses. This sanction, the Commission observed, was consistent with Commission policy and previous Commission decisions denying renewal for fraudulent billing practices that were less extensive and serious than the practices established by this record (Pet. App. 38a-44a).

The court of appeals affirmed the Commission's order (Pet. App. 7a-19a). The court rejected petitioner's argument that the order should be set aside because the Commission had failed to distinguish its action in this case from its grant of license renewals to stations owned by Columbia Broadcasting System in *CBS, Inc.*, 69 F.C.C.2d 1082 (1978), notwithstanding violations that petitioner claimed were more serious than its own. On the basis of its review of the facts in the *CBS, Inc.* case, the court found that the differences between the two cases were "so obvious as to remove the need for explanation"

(Pet. App. 16a; quoting from *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-733 (D.C. Cir. 1965)).¹ The court concluded (Pet. App. 19a) that petitioner's "attempt to convert this case into a vehicle for demonstrating a Commission bias in favor of 'media barons' and against the small, struggling radio stations falls far short of its mark."

ARGUMENT

The court of appeals correctly rejected petitioner's contention (Pet. 14-34) that the Commission has discriminated against it by imposing more severe sanctions (denial of license renewal) on it than it has imposed on other licensees who have committed what petitioner believes to have been more serious offenses. This contention is incorrect.

The Commission's decision denying renewal to White Mountain is consistent with its long standing policy condemning fraudulent billing by broadcast licensees. Since 1962, the Commission has issued a series of public notices and rulemakings that have clearly and repeatedly warned that fraudulent billing is contrary to the public interest and that any licensee engaging in this practice

¹The court also noted White Mountain's reference to the renewal of licenses of two antitrust violators in *General Electric Co.*, 45 F.C.C. 1592 (1964) and *Westinghouse Broadcasting Co.*, 44 F.C.C. 2778 (1962). The court observed that, unlike the *CBS* case, these matters occurred long before the Commission's proceeding on White Mountain's applications and that there was therefore no excuse for White Mountain's failure to raise them at the agency level (Pet. App. 16a n.14). The court further observed that, in any event, renewals notwithstanding antitrust violations not directly related to the use of broadcast facilities will not stand as precedent for the automatic renewal of all broadcast licenses some fifteen years later, and that the Commission was not required to distinguish them every time a licensee is denied renewal (Pet. App. 16a n.14).

risks a loss of its license.² Furthermore, as the court of appeals observed (Pet. App. 18a-19a), in the absence of strong mitigating circumstances,³ the Commission has consistently implemented this policy and denied license renewal in double billing situations.⁴ Thus, in the instant case, where the undisputed evidence established both an extensive and pervasive scheme of fraudulent billing and the knowing failure of petitioner's principal to take effective action to stop such practices, denial of license renewal was consistent with established Commission policy and with Commission treatment of other licensees found to have similarly disregarded the fraudulent billing rule.

²See *Public Notice B, Broadcast Licensees Warned Against Engaging in Double Billing*, 44 F.C.C. 2828 (1962); *Fraudulent Billing Practices*, 1 F.C.C.2d 1068 (1965); *Applicability of Fraudulent Billing Rule*, 1 F.C.C.2d 1075 (1965); *Fraudulent Billing Practices*, 23 F.C.C.2d 70 (1970). Indeed, in 1972—during the very period in which petitioner was engaging in fraudulent billing—the Commission issued yet another public notice reiterating its position on fraudulent billing and emphasizing the serious question such violations raise concerning qualifications to remain a licensee. *In the Matter of Renewal or Revocation Hearing Proceedings in Future Fraudulent Billing Cases*, 38 F.C.C.2d 1051 (1972).

³The court noted that in some instances where the Commission has found specific mitigating circumstances, it imposed a lesser sanction, (Pet. App. 18a-19a n.20). The Commission in this case, however, specifically found that such circumstances were absent here and that the cases were factually distinguishable. Furthermore, petitioner did not claim that those other fraudulent billing cases were applicable here (Pet. App. 44a).

⁴See *Berlin Communications, Inc.* 68 F.C.C. 2d 923 (1978), aff'd, No. 78-2048 (D.C. Cir. Oct. 25, 1979); *WLLE, Inc.*, 65 F.C.C. 2d 774 (1977), aff'd mem., No. 77-1787 (D.C. Cir. Jan. 23, 1979), cert. denied, No. 78-1721 (Oct. 1, 1979); *Monroe Broadcasters, Inc.* 60 F.C.C.2d 792 (1976); *Eastminster Broadcasting Corp.*, 58 F.C.C.2d 24 (1976), aff'd mem., No. 76-1792 (D.C. Cir. June 8, 1977); *United Broadcasting Co. of Florida, Inc.*, 55 F.C.C. 2d 832 (1975); *Wharton Communications, Inc.*, 44 F.C.C.2d 489 (1973).

Petitioner's claim that the Commission's action in this case is contrary to its actions in certain other cases cited by petitioner—and thus allegedly reflects discriminatory treatment—is unfounded. First, as a matter of law the Commission has broad discretion to choose the remedies and sanctions to be imposed in particular cases. See *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). Judicial review of agency sanctions is limited to whether the sanction involved was "unwarranted in law" or "without justification in fact," *Butz v. Glover Livestock Comm'n Co.*, *supra*, 411 U.S. at 186, and where, as here, a particular sanction is supported by substantial evidence, that sanction is not otherwise rendered invalid because it is more severe than sanctions imposed in other cases. See *Butz v. Glover Livestock Comm'n Co.*, *supra*, 411 U.S. at 187-188, *FCC v. WOKO, Inc.*, *supra*, 329 U.S. at 227-228. Moreover, the Commission is certainly not required in each case expressly to distinguish every other case in which it has decided not to impose the same sanction.

Some cases, including *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), on which petitioner relies (Pet. 15), have held that when the imposition of a sanction is alleged to conflict with very similar cases in which the sanction was not imposed, the Commission is required by general administrative law principles to explain the reasons for the different treatment, unless the differences between the cases are "so 'obvious' as to remove the need for explanation" (345 F.2d at 732-733). Contrary to petitioner's claim (Pet. 15), however, the court in this case did not depart from the principles stated in *Melody Music, Inc.* Indeed, it expressly reaffirmed those principles and held that the differences between the cases cited by petitioner and this case were so obvious as to remove the need for explanation (Pet. App. 16a).

Thus, with respect to the *CBS, Inc.* case on which petitioner relies (Pet. 11, 20-21), the court carefully explained that that case involved, *inter alia*, a single isolated misrepresentation by the licensee and that the licensee made full disclosure to the public in two special broadcasts (Pet. App. 16a-18a). In contrast, the facts of this case, as the court observed (Pet. App. 18a), established a fraudulent course of conduct extending over a five and one-half year period. Moreover, the Commission specifically had warned against this conduct and White Mountain's president and sole stockholder—who knew of and participated in the fraudulent conduct—specifically was aware that he was risking loss of his licenses by engaging in this practice.

The court also correctly rejected petitioner's reliance on other cases involving antitrust violations (see Pet. 12, 17-18) on the ground that those violations did not directly relate to the use of broadcast facilities and also on the ground that petitioner had not relied on those cases before the Commission (Pet. App. 16a, n.14). Beyond its bare assertions, petitioner offers no reasons for disagreeing with the court of appeals' conclusion that all the cases on which petitioner relies are readily distinguishable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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